Supreme Court, U.S.
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No. 08-____

In the

Supreme Court of the United State

Yong Li,

Petitioner,

v.

Raytheon Company, Ian C. Mitchell, and Arthur Buliung

Respondents.

Civil Appeal To the
United States Court of Appeal
For The First Circuit

Petition for Writ of Certiorari

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QUESTIONS PRESENTS

1. Whether the absence of temporal proximity between the protected activity and the adverse employment action disproves the causal connection element of a prima facie case in a retaliation claim under Title VII, 42 U.S.C. 2000e-3(a).

(The First Circuit's decision conflicted with the Third, Sixth, and Ninth Circuits' decisions on the same issue).

2. Whether the discovery rule is applicable in Title VII cases.

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PETITION FOR A WRIT OF CERTIORARI

Yong Li hereby petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit in Yong Li v. Raytheon, No. 07-1185 (January 17, 2008).

OPNIONS BELOW

The panel opinion of the United States Court of Appeals for the First Circuit, dated September 10, 2007, is reproduced at Petition's Appendix page 4 ("Pet App 002"). The order of the Court of Appeals denying the petition for rehearing en banc by majority judges, dated January 17, 2008, is reproduced at Pet App 010. The opinion of the United States District Court for the District of Massachusetts, dated November 30, 2006, is reproduced at Pet App 000.

JURISDICTION

The Middlesex Superior The opinion and judgment of the court of appeals were issued on September 10, 2007. A timely petition for rehearing en banc was denied on January 17, 2008. This Court has jurisdiction to review this case pursuant to 28 U.S.C. § 1254. The district court had jurisdiction of this case pursuant to 28 U.S.C. § 1331. The First Circuit had jurisdiction of this case pursuant to 28 U.S.C § 1291.

Justice Souter allowed the petitioner's application for an extension of time to file a petition for writ of certiorari to and including May 16, 2008. The court clerk allowed re-filing the Petition with correct format on the deadline of July 21, 2008. The present Petition for Writ of Certiorari is filed timely pursuant to 28 U.S.C. § 1257 and 2101(c) and Rule 10(1)(c) of the Rules for the U.S. Supreme Court.

STATUTORY PROVISION INVOLVED

The Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-2(a) and 2000e-3(a) prohibit employment discrimination or retaliation against employees.

INTRODUCTION

This case presents two questions. The first question is whether the elapse years between the protected activity and the adverse employment action disproves the causal connection element of a prima facie case in a retaliation claim under Title VII, despite the fact that the petitioner was in another state during the time and the respondents did not have an opportunity to retaliate until the petitioner returned. The Court of Appeal held that "*There must be some temporal proximity between*

the protected conduct (filing the EEO complaint) and the alleged retaliation, (Pet App 008, ¶2)" In so ruling, the First Circuit acknowledged conflict with the Sixth, Ninth, and Third circuits' decisions. See, *Porter v. California Dep's of Corr., 419 F. 3d 885 (9th Cir. 2005)* (the multi-year gap between the plaintiff's protected activity and the adverse employment actions did not defeat the find of a causal connection because the plaintiff's harasser did not have the opportunity to retaliate until he was given responsibility for making personnel decisions); *Dixon v. Gonzales, 481 F. 3d 324 (6th Cir. 2007)* (The lack of temporal proximity between Dixon's 1982 complaint and Reutter's 1992 recommendation does not break the causal link between Dixon's protected activity and the denial of his reinstatement FBI, [because Reutter had no authority or supervisory power over Dixon and was not in a position to legitimately interfere with his employment]); *Ford v. General Motors Corp., 305 F. 3d 554-55 (6th Cir. 2002)* (the five-month interval between the protected activity and the adverse employment actions did not foreclose the finding of a causal connection because the plaintiff was under the control of a different supervisor during this period); *Kachmar v. SunGard Data Sys., Inc., 109 F.3d 173, 177 (3d Cir. 1997)* (internal quotation marks omitted).

Despite these precedents, the Court of Appeals ruled that the two-year gap disproves the causation element of the prima facie case and the panel did not touch on the specific fact that the petitioner was in Langley Virginia during the time. Therefore, the harassers had no opportunity to retaliate until the petitioner returned back to Massachusetts. In so ruling, the First Circuit creates an irreconcilable conflict with the Third, Sixth, and Ninth circuits' decisions. This Court's intervention is necessary to bring the First Circuit into conformity with others, to resolve the conflict between the circuits, to effectuate anti-retaliation claims under Title VII, and to ensure that the millions of employees working in the jurisdictions covered by the First Circuit enjoy the protection from retaliatory discrimination that Congress provided for in 42 U.S.C. 2000e.

The second question is whether the discovery rule is applicable in discrimination cases. This issue has never been addressed in the U.S. Supreme court . See Footnote 10, *Ledbetter v. Goodyear Tire & Rubber Company, Inc., 127 S.Ct. 2162 (U.S. 05/29/2007)* (Because Ledbetter does not argue that such a rule would change the outcome in her case, we have no occasion to address this issue.) In the petitioner's case, when the petitioner was withheld long term assignment, asked to relocate, and was told that her name was on a layoff list, the

petitioner had no reason to suspect the manager's suggestion until later the manager denied his layoff statement and claimed that there was no layoff plan. According to discovery rule, the statute of limitation should start to run on the day her manager denied his layoff statement. The case in hand provides an occasion to address the issue of discovery rule.

STATEMENT OF THE CASE

I. Factual Background

Petitioner, Yong Li ("Li"), is a native Chinese. She completed a B.A. degree in Meteorology and a Master's Degree in Geophysics in China. She and her husband immigrated to U.K. where they lived for seven years. In 1998, she left her successful post in England and moved to the US, where she and her husband were recruited to work at the Air Traffic Control Division of Raytheon located Marlborough Massachusetts. Li was a senior software engineer. According to Raytheon's performance review, Li was "a valuable employee," "an asset of the team", "contributed greatly", "friendly and pleasured to work with." The human resources ("HR") witness form stated "She [Li] was never confrontational."

In 2001, Li was working in a database management group with all women leaders.

Technically, Li was much more advanced than these leads. Li had finished the complicated programming but never gained respect and recognition. One group leader, who specialized in French literature, had difficult time understanding Li's short efficient software-code. Another leader, a 25 years old woman, requested Li to make reword. Li found that the expanded code caused unnecessary repetition, so that Li sent an email to get opinions of the group members. The team

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[1] Gayle McEleney had French literature degree and worked as the software group leader. Another group leader, Belinda A Gunn, was a 25 years old young girl.

Li's code	Belinda's code

if (MODIFY && (yy_rtn == TRUE))
{
ys_unlock(MODIFY);
}
else
{
ys_unlock(VIEW);
}
	if (yy_rtn == TRUE)
	{
	if (MODIFY)
	{
	ys_unlock(MODIFY);
	}
	else (VIEW)
	{
	ys_unlock(VIEW);
	}
	}
	else (yy_rtn == FALSE)
	{
	ys_unlock(VIEW);
	}

A copy of the internal complaint with the code discussion is provided in Pet App 015-016.

manager, Jen Lewis, became angry and she kept Li into a small meeting room. Ms. Lewis declined Li's request of letting principle engineers make decision but insisted that the group leader should make decision. When three other co-workers (Conall McGleenan, William Kerr, and Ian Johnson) addressed opinions in support of Li, Ms. Lewis was angry. She made these co-workers go out of the room and kept only Li and the group leaders in the room. Then Ms. Lewis accused Li of using the technical discussion to attack the group leader. Li, the only Chinese in that group, tried to apologize to Ms. Lewis in hopes of improving the relationship. Soon after, Li left that the group and transferred to Raytheon's Sudbury (a neighbor town) facility. Lamentably, the 2001 confrontation was reflected in Li's 2002 performance review, which stated Li "disrespected the group leader". Li refused to sign the negative performance review, and also requested an apology from Ms. Lewis. However, Li's manager told Li that Ms. Lewis would become a very high level person in Raytheon, and Li would make an enemy if she requested an apology. Spurred into action, Li filed a racial discrimination complaint to Raytheon's Equal Employment Opportunity office (EEO). The EEO investigator Mattie Ervin made an investigation but failed to interview Li's co-worker William Kerr who had

stated in his email that Li was treated unfairly[2], the investigation only interviewed those leads who mischaracterized Li as having a "strong personality" and being "opinionated." EEO claimed Li's allegation was not found but declined to let Li see the investigation report[3]. Further, human resources ("HR") asked Li to see a company counselor. Li had no idea about mental evaluation, and she thought the counselor could help her get the investigation report.

After that, Li was voluntarily transferred to Langley, Virginia. In Langley, Li requested HR to interview William Kerr for a thorough investigation, but the HR officer Buliung failed to do so. Instead, he interviewed back to Jen Lewis.

In 2004, upon her return to Marlborough, the ex-team manager Jen Lewis aggressively started staring at Li in the hallway and attempting to intimidate her whenever they were alone (the staring incident is a finding of fact in Li's workers

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[2] Li's complaint to EEO included Mr. Kerr's email "When we first went out to Marlborough, it very quickly became clear to both Conall and myself that you were not being fairly treated especially by Gayle. I was surprised that in the US above all places, that such behavior would be tolerated... (Pet App 014)"

[3] In 2005, Li received a copy from EEOC. Li found out that the investigator merely collected negative opinions from people Li had complained about.

comp case[1]. Further, Jen Lewis' office mate, Ian C. Mitchell, became Li's department manager. Immediately, Li was withheld from long term assignments. Li's second manager Scott Oglesby, who worked for Ian Mitchell, suggested that Li should leave Raytheon because of the prior problems with the ex-team manager Jen Lewis. He told Li that there was no assignment for her because all of the jobs needed security clearance. When Li pointed out that the project ERAM (En Route Airline Modernization) did not require clearance, Oglesby said that her skill was not suitable to ERAM. Instead, he asked Li to apply for a job in Towson, Maryland. When Li addressed that she had sleep problems when she worked in Langley Virginia while being separated from her family, Oglesby was angry and claimed "the company is going to layoff, and I'm sure your name is on the list." Li was pushed to apply for the job in Towson Maryland, but she failed to get the job because it needed clearance. Li herself asked help from project ERAM managers and got an assignment. Once Li started worked in ERAM in June 2004, she met a new hirer, Gordon Maxx, in the same group. She started suspicion that the managers tried to remove her out of the company

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[1] Board #0426804, Decision of Administrative Judge of the Department of Industrial Accidents, June 13, 2007.

because her prior complaint against Jen Lewis, so that she sent an email to HR officer Arthur Buliung in June 2004, and received no answer. Then she emailed her suspicion to Raytheon Asian Pacific Association (RAPA) in July 2004. HR arranged a meeting, but did not tell her whether there was a layoff plan or whether her name was on a list. Instead, HR constantly blamed her lack of security clearance and difficulties in finding a job. HR never explained to Li why there were about 26 engineers (including the department manager Ian C. Mitchell) who had no security clearance, but Li was the only one was asked to leave. On July 31, 2004, knowing that Li had reported to HR, Li's manager Scott Oglesby suddenly denied his layoff statement on July 31, 2004 "No, I never said that, you can not prove. Actually there was no layoff [plan]." Li was in shock. Mr. Oglesby also laughed at Li: "when Jen Lewis becomes the lab manager, you will be in trouble." Li responded "Bill Clinton became the president, Paula Jones was safe," and Mr. Oglesby said "Shame!" Li immediately reported Oglesby's conduct to human resources (HR) office. However, Raytheon HR never clarified the falsity of the layoff statement until 2006, the department manager Ian C. Mitchell answered Li's Interrogatory, §6: "there were no layoffs in the Company's Marlborough facility in May, 2004. Moreover, there was no list of

people who would be laid off if there was to be a layoff.

Meanwhile, from January to August of 2004, the ex-team manager Jen Lewis constantly stared at Li in the hallway whenever they met alone, and Li felt physically intimidated. After eight months of abuse (the staring incident is a finding of fact in Li's workers comp case[5]), Li became worried about her personal safety and family, and she email to the HR for guidance on July 29, 2004.

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[5] Board #0426804, Decision of Administrative Judge of the Department of Industrial Accidents, June 13, 2007. page 13-14:

When Ms. Li returned from Virginia to the Marlboro facility, on occasion, she and Ms. Lewis would encounter each other in the hallways or footpaths of the Marlboro facility. If no one was around when this occurred, Ms. Jen Lewis would stare at Ms. Li. These encounters occurred occasionally from January 2004 to August 2004.

On account of the staring of Jen Lewis, Ms. Li sent an e-mail to Art Builing in the human resources department concerning her safety.

Ms. Li thought her life would be in danger because of the staring at her by Jen Lewis.

Ms. Li felt physically threatened by Jen Lewis because of Jen Lewis' staring at her.

The first time Jen Lewis stared at Ms. Li was in January 2004.

As of June 2004, Ms. Li and Jen Lewis worked in the same building, and they would encounter each other more often, about once every two weeks.

According to Ms. Li, when Jen Lewis stared at her, the impression revealed disgust. To Ms. Li, it was a hard look, a challenging look.

When Ms. Lewis stared at Ms. Li in January 2004, Ms. Li was very nervous, so that she sent an e-mail to a coworker, Hadoo.

HR officer Arthur Buliung set a meeting in his own office on August 3, 2004, into which he embedded a mental evaluation without Li's express knowledge. In fact, they violated Li's right of consent and right of privacy. Li assumed the counselor was an investigator. The meeting started with Arthur Buliung and another HR officer Stephanie Kolenski inside, the counselor John Didio did not ask why Li felt unsafe. The first question he asked was "Do you want to kill someone." When Li answered "For this question, you should ask them," Didio became excited, and he made a very sneaky and sneering face, stared at Li, and asked "Do you want to ... or do you want to ..." each "do you want to" followed a finger pointing at Li. Gripped with panic, Li was traumatized and felt raped. She could not function normally since then.

HR officer Buliung stopped Li to report the interrogation interview to Raytheon Asian Pacific Association (RAPA), but he himself emailed to RAPA and claimed that the issue was resolved. Not allowed to report to RAPA, Li reported to Raytheon Ethic group, but Ethic officer Tim Schultz contacted with Buliung and rejected Li's complaint.

To stop Li continuing reporting, Raytheon's software lab manager Maryann King set up a meeting together with Arthur Buliung, Stephanie Kolenski and a Chinese manager Ed Tang. They

asked Li to stop sending emails and move forward. Li went to Maryann King's office and told her that the counselor's accusation caused her to want to commit suicide, but Ms. King answered "it's not intentional."

Tortured by flashbacks, Li emailed Raytheon's CEO Bill Swanson on August 30, 2004 and reported the trauma event. On the next day, Li was put on administrative leave and ordered to see a psychiatrist, Dr. Julia Reade.

Although Dr. Reade stated that Li suffered from an acute mental illness with "psychotic features"[6] and was not fit to work. Raytheon, however, refused to release the evaluation either to Li or to her Chinese doctors[7]. Meanwhile, Li's own doctor diagnosed her with Post-Traumatic Stress Disorder (PTSD), and helped her applying for short term disability. Raytheon, however, sent a letter and threatened to terminate Li's employment if she did not return to work in 6 days notice.

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[6] Li did not know her mental evaluation was fixed until September 2005 she received a copy of evaluation from worker comp court. Li did not know the 2002 investigation report until 2005, she received a copy from EEOC.

[7] Raytheon refused to give Dr. Reade's report to petitioner, but agreed to send a copy to petitioner's primary physician Dr. Monica Gomez. However, Dr. Gomez told Li that she could not give Li a copy because this report belongs to Raytheon, and Li should request a copy from Raytheon.

Li never went back to work. She had been hospitalized several times and eventually became long-term (possibly permanent) mentally disabled. Her job was terminated after the FMLA expired.

On April 21, 2005, Li filed a complaint to EEOC.

In August of 2005, Li received a copy of the 2002 investigation report (Mattie Ervin report) from EEOC while her complaint was dismissed in EEOC.

In September of 2005, Li received a copy of Dr. Reade's report of 2004. Raytheon surreptitiously sent Mattie Ervin report to Dr. Reade to pre-fix the mental evaluation of Li. Based on the comments of "strong personality" and "opinioned" in Mattie Ervin report, Dr. Reade concluded Li had "personality disorder" and caused employment problem, despite Li was never told that she had a "strong personality" and was "opinioned," despite Li's performance review stated "Yong was friendly and pleasant to work with, and despite Stephanie Kolenski's witness form stated "She was never confrontational."

(On June 13, 2006, the workers compensation court adopted Dr. Reade's report and dismissed Li's mental injury claim, despite the court referred

doctor and Li's own doctor stated that her mental condition caused by Raytheon's employment. [3]

II. Proceedings Below

A. The District Court

The District Court granted Raytheon's Motion for Summary Judgment without providing a hearing. The opinion is only a few lines and merely referred to Raytheon's conclusion. The Order barely ruled "Li presents no competent evidence of retaliatory acts." The District Court denied Li's Motion for explanation of this Order, and did not indicate on which element of Title VII claims Li had failed to proffer evidence. The District Court declined Li's various state-law claims. (Pet App 001)

B. The Court of Appeal

The Court of Appeal ("panel") affirmed and wrote down detailed opinions. With respect to the alleged adverse action that occurred in 2004, the panel ruled that the events in early 2004 (the withholding of an assignment, pushing Li to quit or to relocate, claiming Li's name was on a layoff list, and the constant staring incident etc.) were outside of statute of limitation, and the events in later 2004

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[3] Board #0426804, Decision of Administrative Judge of the Department of Industrial Accidents, June 13, 2007.

(imposed mental evaluation or illegal interrogation [violated her right of consent and right of privacy for two HR officers inside], accusing Li of wanting to kill someone, putting Li on administrative leave, using the secret report to pre-fix doctor's conclusion[9], hiding the doctor's report while warning Li to go back to work, and the hindrance of Li's application for short term disability benefit etc.) had no causal connection to Li's prior EEO complaint in 2002, the panel ruled that the two-year gap defeated the claim. (Pet App 008)

The panel ruled that "too many gaps" from the protected activity in 2002 to the alleged retaliatory events in 2004. The panel did not touch on Li's argument that she was in Langley Virginia during the time and the managers had no opportunity to retaliate until her return to Marlboro in 2004. The panel upheld that "*There must be some temporal proximity between the protected conduct (filing the EEO complaint) and the alleged retaliation,*" and relied on the cases "*Dessler v. Daniel, 315 F. 3d 75, 79-80 (1st Cir. 2001) (two year gap between protected conduct and alleged retaliation defeated claim); Miller v. New Hampshire Dept. of*

[9] Board #0426804, June 13, 2007, the Worker Comp court adopted Dr. Reade's report and dismissed Li's mental injury claim.

Corrections, 296 F. 3d 18, 19 (1st Cir. 2002) (same); Mesnick v. General Electric Co., 950 F. 2d 816, 828 (1st Cir. 1991) (nine month gap defeated retaliation claim)." (Pet App 009, ¶1) The panel failed to realize that Li's case was distinctive to any precedent in the First Circuit Court.

The panel's ruling of failure to establish the causal connection resulted in the "absence of separate and timely violation of Title VII", thus the panel pre-emptied the argument of whether the "discovery rule" applies to this case. (Pet App 009, ¶2)

C. The Order for Rehearing En Banc

Li's Petition for Rehearing En Banc indicated that the panel's decision conflicts with the authoritative decisions of United States Courts of Appeals in other circuits which have addressed the same issue. See, *Ford v. General Motors Corp., 305 F. 3d 554-55 (6th Cir. 2002); Porter v. California Dep's of Corr., 419 F. 3d 885 (9th Cir. 2005); Dixon v. Gonzales, 481 F. 3d 324 (6th Cir. 2007).*

On January 17, 2008, the majority judges denied Li's Petition for Rehearing En Banc. (Pet App 010)

REASONS FOR GRANTING THE PETITION

The Court should grant the petition because the decision below conflicts with the Sixth, Ninth, and

Third circuits' decisions in *Dixon v. Gonzales*, *481 F. 3d 324 (6th Cir. 2007)*; *Porter v. California Dep's of Corr.*, *419 F. 3d 885 (9th Cir. 2005)*; *Ford v. General Motors Corp.*, *305 F. 3d 554-55 (6th Cir. 2002)*; *Kachmar v. SunGard Data Sys., Inc.*, *109 F.3d 173, 177 (3d Cir. 1997)* on the issue of causal connection to establish a prima facie case in retaliation claims under Title VII.

Further, the Court should grant the petition because whether discovery rule is applicable in Title VII claims had never been addressed before.

I. Standard of Review for Summary Judgment

In the case of *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000), the unanimous U.S. Supreme Court reaffirmed that "the standard for granting summary judgment 'mirrors' the standard for judgment as a matter of law, such that the inquiry under each is the same." *Reeves*, at 2110. This Honorable Court held that, although all of the evidence should be reviewed by the court, not all evidence should be given weight. The court "must disregard all evidence favorable to the moving party that the jury is not required to believe. See *Wright & Miller*, at 299. That is, the court should give credence to the evidence favoring the nonmovant as well as that 'evidence supporting the moving party that is uncontradicted and

unimpeached, at least to the extent that evidence comes from disinterested witnesses.'" *Reeves*, at 2110. In the present case, a jury question is present because the petitioner presented evidence that, when taken as a whole, created a fact issue as to whether the alleged retaliatory conducts in 2004 was linked to the prior racial discrimination complaint in 2002.

II. The Decision Below Conflicts with The Rulings of Three Other Circuit Courts On the Issue of Whether the Elapse Years Between the Protected Activity and the Adverse Employment Action Disproves the Causal Connection Element of A Prima Facie Case in A Retaliation Claim.

In this case, the court of appeal held that "*There must be some temporal proximity between the protected conduct (filing the EEO complaint) and the alleged retaliation,*" the panel disregarded that Li was in another state and the managers had no opportunity to retaliate until Li returned. This decision conflicted with the Third, Sixth and Ninth Circuits' decisions on the causal connection matter in retaliation claims.

In Dixon v. Gonzales, 481 F. 3d 324 (6th Cir. 2007), Dixon argues that the district court erred by focusing narrowly on the ten-year period that elapsed here and failing to take into account the surrounding facts. In particular, Dixon argues that a finding of causal connection

is not foreclosed because Reutter [Dixon's ex-supervisor] did not have the ability to retaliate against him until Reutter's views on Dixon were solicited during the FBI's reinstatement investigation. Dixon claims that from the time Reutter was removed from his position in the Applicant Program in 1982 until Dixon left the FBI in 1988, Reutter "had no authority or supervisory power over [Dixon] and was not in a position to legitimately interfere with [his] employment." Dixon argues that Reutter retaliated against him at the first opportunity he had and as such, the lack of temporal proximity between Dixon's 1982 complaint and Reutter's 1992 recommendation does not break the causal link between Dixon's protected activity and the denial of his reinstatement to the FBI.

The Sixth Circuit agreed with Dixon insofar as a mere lapse in time between the protected activity and the adverse employment action does not inevitably foreclose a finding of causality, this is especially true in the context of a *reinstatement* case, in which the time lapse between the protected activity and the denial of reinstatement is likely to be lengthier than in a typical employment-discrimination case. *Id.*

In Porter v. California Dep's of Corr., 419 F. 3d 885 (9th Cir. 2005), the plaintiff brought suit alleging that she was retaliated against because she complained about sexual harassment. *Id. at 887.* The plaintiff reported her complaints in 1995 but the alleged retaliation-the denial

by the plaintiff's alleged harasser of her various requests for transfers-did not occur until 1998. *Id. at 887-89.* In rendering its decision, the Ninth Circuit first cited approvingly from the Third Circuit's decision in *Kachmar v. SunGard Data Sys., Inc.*, 109 F.3d 173, 177 (3d Cir. 1997), in which the Third Circuit emphasized that causation is a fact-specific inquiry and is not reducible merely to a measurement of temporal proximity:

> It is important to emphasize that it is causation, not temporal proximity itself, that is an element of plaintiff's prima facie case, and temporal proximity merely provides an evidentiary basis from which an inference can be drawn. The element of causation, which necessarily involves an inquiry into the motives of an employer, is highly context-specific. When there may be valid reasons why the adverse employment action was not taken immediately, the absence of immediacy between the cause and effect does not disprove causation.

Porter, 419 F.3d at 895 (quoting Kachmar, 109 F.3d at 177).

The Ninth Circuit concluded that the multi-year gap between the plaintiff's protected activity and the adverse employment actions did not defeat a finding of a causal connection because the plaintiff's harasser did not have the opportunity to retaliate until he was given responsibility for making personnel decisions. *Id.* at 895.

In *Ford v. General Motors Corp., 305 F. 3d 554-55 (6th Cir. 2002)*, the Sixth Circuit determined that the five-month interval between the protected activity and the adverse employment actions did not foreclose a finding of a causal connection because the plaintiff was under the control of a different supervisor during this period. *Id.* at 554-55.

In the instant case, Li filed an internal discrimination complaint at the end of 2002. Then she voluntarily went to another state. Upon her return to original facility in January 2004, the alleged retaliation started immediately. The harassment started from early 2004 to later 2004, until Li was traumatized and took medical leave and became long term disabled. The Court of Appeal simply ruled "*two years gap between protected conduct and alleged retaliation defeated claim,*" and did not touch on the specific fact that Li was in another state in 2003. The majority judges of First Circuit denied Li's petition for hearing en banc.

In short, the First Circuit Court merely measured the temporal proximity between the protected activity and the alleged retaliatory conduct, while the Third, Sixth, and Ninth Circuits adopted a fact-specific inquiry and emphasized that it is causation, not temporal proximity itself, that is an element of the prima facie case. This Court should grant the

petition to compel conformity with other circuits and to ensure that the petitioner and other employees working in the jurisdictions covered by the First Circuit are afforded the full measure of protection from retaliation that Congress both intended and provided for in §2000e-3(a).

III. The Court Should Make A Decision On Whether the Discovery Rule Is Applicable In This Case.

Another reason the panel affirmed the summary judgment was that some of the alleged misconducts were outside of the statue of limitation. The panel simply ruled that the events (withholding assignment, pushed to quit or relocate, and claiming Li's name was on a layoff list) were timely barred. The panel did not touch on Li's argument about the discovery rule.

When Li was withheld permanent assignment, was pushed to apply for a job in Towson Maryland, and was told that her name was on a layoff list, she had no reason to suspect the conduct harbored retaliatory animus until her supervisor denied his layoff statement and claimed there was no layoff plan. Li immediately reported her supervisor's conduct to Raytheon HR. However, HR never clarified the falsity of the layoff statement until the pretrial discovery. According to discovery rule, the statute of limitation should start to run on the day

(July 31, 2004) when her section manager denied his layoff statement and claimed there was no layoff plan, while the 300 days prior to reporting to EEOC is June 25, 2004.

Since whether the discovery rule is applicable in discrimination cases has never passed judgment in the U.S. Supreme Court . See Footnote 10, *Ledbetter v. Goodyear Tire & Rubber Company, Inc., 127 S.Ct. 2162 (U.S. 05/29/2007)* (Because Ledbetter does not argue that such a rule would change the outcome in her case, we have no occasion to address this issue.) This case proffers a good occasion for this Court to address this issue.

Li made her argument, "[that several circuits] applied a three-factor test; the most important factor concerned whether 'the nature of the violations should trigger an employee's awareness of the need to assert her rights.'" *Martin v. Nannie & the Newborns, Inc., 3 F.3d 1410, 1415 and n.6 (10th Cir. 1993)*; see also *West v. Philadelphia Elec. Co., 45 F.3d 744, 755 and n.9 (3d Cir. 1995)* ; *Berry v. Board of Supervisors, 715 F.2d 971 (5th Cir. 1983)* ; *Bell v. Chesapeake & Ohio Ry., 929 F.2d 220, 223-25 (6th Cir. 1991)* ; *Roberts v. Gadsden Mem'l Hosp., 835 F.2d 793, 801 (11th Cir. 1998).*

Obviously, the Circuit Court did not want to touch on the fact that Li's manager denied his layoff statement, which could be an anchor event.

The closest rule to resolve this problem is the third type of continuing violation doctrine in *Place v. Abbott Lab, 215 F.3d 803, (7th Cir. 06/01/2005)*:

> We have recognized three types of continuing violations: (1) where the exact day of the violation is difficult to pinpoint because the employer's decision making process takes place over a period of time; (2) where the employer has a systematic, openly espoused policy alleged to be discriminatory; and (3) where the employer's discriminatory conduct is so covert that its discriminatory character is not immediately apparent. (numbers added)

As the Seven Circuit indicated, the third type "*where the employer's discriminatory conduct is so covert that its discriminatory character is not immediately apparent*" is more analogous to the "discovery rule."

Another formulation, crafted in the Seventh Circuit, applied the continuing violations doctrine to cases where "it would have been unreasonable to expect the plaintiff to sue before the statute ran on

that conduct, as in a case in which the conduct could constitute, or be recognized, as actionable harassment only in the light of events that occurred later, within the period of the statute of limitations." *Galloway v. Gen. Motors Serv. Parts Operations, 78 F.3d 1164, 1167 (7th Cir. 1996).* This approach was adopted or cited with approval by the First, Fourth, and Federal Circuits. See *Sabree v. United Bd. of Carpenters & Joiners, Local 33, 921 F.2d 396 (1st Cir. 1990)* ; *Emmert v. Runyon, No. 98-2027 (4th Cir. 1999)* (cited with approval) ; *Bosley v. Merit Systems Prot. Bd., 162 F.3d 665, 667 (Fed. Cir. 1998).*

Li's issue is distinguishable from all of the precedents. In those cases, the continuing violation triggered the victims' awareness based on the pattern, frequency and permanency of the unlawful practice. In this case, Li's awareness was triggered solely depending on the manager's denial of layoff statement.

The U.S. Supreme Court also noted that an issue might arise as to whether the limitation period begins to run when the incident occurs or if the discovery rule should be applied and the limitation period run from when the wrongful action is discovered. See Footnote 10, *Ledbetter v. Goodyear Tire & Rubber Company, Inc., 127 S.Ct. 2162 (U.S. 05/29/2007)* (Because Ledbetter does not argue that

such a rule would change the outcome in her case, we have no occasion to address this issue.) Although the Court recognized this as a potential issue, it declined to provide any guidance toward a resolution. Li's case proffers a good occasion for this Court to address this issue.

IV. The Questions Presented Are Two Important Issues Under Federal Law.

The two questions presented in this case involve important issues of federal law. Congress has long recognized the importance of eliminating discrimination and retaliation in employment. In enacting sections §2000e-2 and §2000e-3, Congress unmistakably intended to ensure that no person would be deterred from exercising his rights under Title VII by any kinds of discrimination and retaliation.

Congress views a ban on retaliation as essential to its effort to eradicate invidious discrimination in all of its guises is confirmed by the fact that every major federal anti-discrimination statute prohibits retaliation. See Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-3(a); National Labor Relations Act, 29 U.S.C. § 158(a)(1); Labor Standards Act of 1938, 29 U.S.C. §215(a)(3); Americans with Disabilities Act, 42 U.S.C. § 12203(a), (b); Family and Medical Leave Act, 29

U.S.C. § 2615(a); Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1140; Uniform Services Employment and Reemployment Rights Act, 38 U.S.C. §4311(b); Occupational Safety and Health Act, 29 U.S.C. § 660(c)(1).

The U.S. Supreme Court had accepted that temporal proximity maybe sufficient in a narrow set of cases. See Clark County, 532 U.S. at 273 (referencing "cases that accept mere temporal proximity . . . as sufficient evidence of causality to establish a prima facie case" and noting that those cases "uniformly hold that the temporal proximity must be 'very close'") (citations omitted) However, the Supreme Court had never have an occasion to embrace the premise that in certain distinct cases like *Dixon v. Gonzales, 481 F. 3d 324 (6th Cir. 2007); Porter v. California Dep's of Corr., 419 F. 3d 885 (9th Cir. 2005); Ford v. General Motors Corp., 305 F. 3d 554-55 (6th Cir. 2002); Kachmar v. SunGard Data Sys., Inc., 109 F.3d 173, 177 (3d Cir. 1997),* where temporal proximity between the protected activity and the adverse employment action does not exist. The Court should clarify that "it is causation, not temporal proximity itself, that is an element of plaintiff's prima facie case, and temporal proximity merely provides an evidentiary basis from which an inference can be drawn." *Porter, 419 F.3d at 895* (quoting *Kachmar, 109 F.3d at 177*), for conformity to the

decisions of the Circuit Courts with respect to the element of causation under Title VII claim.

The U.S. Supreme Court noted that an issue might arise as to whether the limitation period begins to run when the incident occurs or if the discovery rule should applied and the limitation period run from when it wrongful action is discovered. See Footnote 10, *Ledbetter v. Goodyear Tire & Rubber Company, Inc., 127 S.Ct. 2162 (U.S. 05/29/2007)* (citation omitted.) Although the Court recognized this as a potential issue, it declined to provide any guidance toward a resolution. A dissent of three justices, while agreeing that the application of the discovery rule was not at issue in *National Railroad Passenger Corp. v. Morgan, 122 S.Ct. 2061, 153 L.Ed.2d 106 (U.S. Supreme Court, 2002)* , nonetheless stated their opinion that the discovery rule would be applicable to the Title VII statutory limitation. The Petitioner respectfully requests this Court to make decision on whether the discovery rule, under which doctrine, is applicable based on the facts in this case.

Finally, the first question presented in this case is very important because of the inequitable disparities it creates within the America employment sector. The rights and remedies afforded an employee faced with retaliatory harassment should not depend on where she

happens to work. Accordingly, the Court should grant the petition to ensure that all employees in USA enjoy the full measure of protection Congress granted them in §2000e-2 and §2000e-3, and to ensure that employees in Maine, Massachusetts, New Hampshire, Rhode Island, and Puerto Rico possess the same rights and remedies as employees working in the states judicially covered by the Third, Sixth, and Ninth Circuits Court.

CONCLUSION

For the foregoing reasons, the petition for a writ certiorari should be granted.

Respectfully submitted,

YONG LI (pro se)

/s/

Name: Yong Li
Address: 32 Willow Road
Sudbury MA 01776
Email: yli01776@yahoo.com

pro se petitioner

Date: July 3, 2008

No. 08-____

In the

Supreme Court of the United State

Yong Li,

Petitioner,

v.

Raytheon Company, Ian C. Mitchell, and Arthur Buliung

Respondents.

Civil Appeal To the
United States Court of Appeal
For The First Circuit

Appendix

Yong Li (pro se)
32 Willow Road.
Sudbury MA 01776
pro se Petitioner

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UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CIVIL ACTION NO. 05-12035-RGS

YONG LI,

v.

RAYTHEON COMPANY, IAN C. MITCHELL, and ARTHUR BULIUNG

ORDER ON DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

November 30, 2006

STEARNS, D.J.

This action arises out of plaintiff Yong Li's employment with defendant Raytheon Company and its investigations of Li's internal race discrimination complaint. Defendants Raytheon, Ian C. Mitchell (Li's former department manager at Raytheon), and Arthur Buliung (a former Raytheon human resources administrator) move for summary judgment on all of Li's race discrimination and retaliation claims, and her associated state law claims. Defendants point out that the material facts are undisputed and that there is no evidence supporting Li's claims[1].

The court agrees with Raytheon that Li's claims fail because, among other things, she is an at-will employee, there is no competent evidence that Raytheon treated Li differently than any other employee, Li presents no competent evidence of retaliatory acts, that she suffered an adverse employment action, that Raytheon engaged in misconduct in its handling of her internal discrimination complaint or the investigation of her failure to return to Raytheon after the expiration of her Family Medical Leave Act (FMLA) leave. Accordingly, for the reasons stated in their supporting memorandum, the motion of defendants Raytheon Company, Ian C. Mitchell, and Arthur Buliung for summary judgment is ALLOWED on Li's federal claims[2].

SO ORDERED.

RICHARD G. STEARNS

UNITED STATES DISTRICT JUDGE

---

1. The court is thoroughly familiar with the facts and claims in this case having acted on sixty-five motions of substance and procedure since allowing Li to amend her Complaint in February of 2006.

2. The foundational federal claims being dismissed, the court declines to consider Li's various state-law claims. See Carnegie-Mellon Univ. v. Cohill, 484 U.S. 343, 350 n 7 (1988).

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT
No. 07-1185

YONG LI,
Plaintiff, Appellant,
v.
RAYTHEON COMPANY, ET AL.,
Defendants, Appellees.

Before

Lynch, Circuit Judge,
Campbell and Selya,
Senior Circuit Judge

JUDGMENT

Entered: September 10, 2007

Appellant Yong Li seeks review of the district court's order granting summary judgmentfor appellees Raytheon Corp., Ian C. Mitchell and Arthur Buliung, dismissing Li's discrimination and retaliation complaint. We have conducted the required de novo review of the record, Noviello v. City of Boston, 398 F.3d 76, 84 (1st Cir. 2005), and conclude that the dismissal was proper.

Briefly, these are the relevant facts. Li, a Chinese national, began working as a senior software engineer at the Raytheon facility in arlborough, Massachusetts, in 1998. In July 2001, there was a disagreement between Li and

another software engineer regarding the proper methodology to use in a particular software program. Li believed her approach was superior, but the team manager picked the competing proposal. Li believed that this decision and the team manager's subsequent criticism of her was motivated by racial animus against her because she is Chinese. More than a year later, in October 2002, Li filed a formal complaint against the manager with Raytheon's Equal Employment Opportunity ("EEO") office. The EEO office investigated, interviewed co-workers Li suggested, and concluded that no discrimination had occurred.

Li disagreed with the results of the investigation and demanded a copy of the written report. When the EEO office declined, Li concluded that Raytheon was continuing to discriminate against her. She demanded a new investigation, which was undertaken by appellee Buliung, a human resources administrator for Raytheon. Additional employees suggested by Li were interviewed, and again the investigation found no discrimination against Li.

Li then transferred to Raytheon Langley, Virginia, facility, where she worked until December 2003. Upon her return to Marlborough in January 2004, Li claims that she began to suffer widespread retaliation for filing the EEO complaint more then a year earlier. The team manager who was the subject of the complaint allegedly "aggressively

stared" at Li and attempted to intimidate her whenever they were alone. Li's section manager allegedly failed to assist her in finding a new permanent assignment, suggested that she transfer to the Raytheon facility in Towson, Maryland, and intimidated that her name was on a lay-off list. Despite the lack of a permanent, however, Li's section manager found full-time work for Li throughout this time and Li drew her full salary. In June 2004, Li found a permanent assignment. Also in June 2004, Li sent an email to the Raytheon Asian Pacific Association ("RAPA") complaining about a "conspiracy" to force her out of Raytheon. Buliung and two other human resources employees met with Li do discuss this email. They explained that the difficulty placing her after her return from Langley was because she lacked security clearance, not because of retaliation. Li did not believe this explanation. She reported that her team manager's staring was becoming "more aggressive and intense." A few weeks later, Li emailed Buliung recounting an earlier conversation with her section manager in which she stated that if anything happened to her or her family, "don't believe that it's an accident' it many be a 'murder'!"

Buliung then recommended that Li meet with John Didio, a counselor from Raytheon's Employee Assitance Program ("EAP"). Li agreed, apparently

believing that this person was an investigator looking into her claims. At this meeting, Li claims that Didio never asked her about her fears for her own and her family's safety, but instead pointed his finger at her, stared at her, and demanded, "Do you want to kill someone?" Li became angry and the meeting abruptly ended.

A few days later, Li emailed the RAPA mailing list again, this time complaining about Didio. The email's subject line stated, "Any policy supports such disgusting behavior to insult an asi [sic] woman?" Buliung and another human resources employee again met with Li and told her to stop using the RAPA mailing list for personaly matters. Buliung also sent an email to RAPA explaining that the situation had been resolved. Viewing this email as a misrepresentation of the truth, Li filed a complaint against Buliung with the Raytheon Business Ethics and Compliance Officer, which was denied. Li also informed the Director of Software Engineering that the meeting with Didio made her want to commit suicide.

On August 30, 2004, Li sent a mass email to the company that contained the following statement:

John Didio with his professional skill poisoned my brain, he treated me, a victim as a potential

murder, this is an evil behavior! As I'm sitting in my office and working, quit offenly [sic], I want to scream!!

The following day, Raytheon place Li on administrative leave and recommended that she see a psychiatrist, which she did.

Li claims that Raytheon the "hid" the psychiatrist's report and would not give it to her or her Chinese doctors. Li also applied for and received short-term disability benefits from Raytheon's insurer, MetLife. These benefits were discontinued, Li claims, when Raytheon refused to release the psychiatrist's report to MetLife. Raytheon "administratively terminated" Li after her short-term disability benefits ceased and she refused to return to work[1]. Li appealed and the short-term disability benefits were reinstated. MetLife also found Li eligible for long-term disability benefits, which she began receiving in Janaury 2005. Raytheon subsequently restored Li to medical leave status.

Li her discrimination complaint, asserting just federal law claims against Raytheon, at the Equal

---

[1] After receiving a letter from Raytheon informing her that she would have to return to work unless there were "extenuating circumstances" preventing her return, Li called a human resources employee and asked, "What if I wanted to kill you?"

Employment Opportunity Commission ("EEOC") on April 21, 2005. The following day, she filed the complaint at the Massachusetts Commision Against Discrimination ("MCAD"). Contrary to Raytheon's argument, it makes no difference that the complaint was filed at the EEOC first. Pursuant to the "work-sharing agreement" between the EEOC and the MCAD, a complaint filed with one agency is considered automatically filed with the other. Davis v. Lucent technologies, Inc., 251 F. 2d 227, 230 n.1 (1st Cir. 2001). As a result, Li is entitled to the 300-day limitations period provided in 42 U.S.C. § 2000e-5(e), not the 180 days argued by Raytheon. See also Seery v. Biogen, Inc., 203 F. Supp. 2d 35, 44 (D. Mass. 2002).

Even applying the longer limitation period, however, it is clear that Li's claims are time-barred. In July 2001, Li believed that her programming work was rejected and she was criticized solely because she is Chinese. Li officially complained about this discrimination to the Raytheon EEO office in October 2002. In late 2002 and early 2003, Li believed that EEO investigation was a sham and constituted further discrimination against her. When Li returned from Langley, Virginia in January 2004, she believed that numerous Raytheon employees were retaliating against her because of the October 2002 EEO complaint.

Despite her contemporaneous belief that she had been the victim of discriminatory, harassing, and/or retaliatory conduct in violation of Title VII in 2001, 2002, 2003, and early 2004, Li did not file her complaint with the EEOC until April 2005. Her complaint was timely only as to events that occurred within the prior 300 days, on or after June 25, 2004.

As to the events that occurred within the limitation period – the meeting with the EAP counselor, being place on administrative leave, the problems surrounding the psychiatrist's report and Li's short-term disability benefits – Li has failed to meeting her burden of showing that these are discrete discriminatory or retaliatory acts in violation of Title VII. Li has not produced any competent evidence that these events were motivated by discriminatory animus, and there are simply too many gaps in the chronology to sustain her claim that these events constitute impermissible retaliation under Title VII. There must be some temporal proximity between the protected conduct (filing the EEO complaint) and the alleged retaliation. Gaps of months and years weaken any inference of a causal connection. See, e.g., Dessler v. Daniel, 315 F. 3d 75, 79-80 (1st Cir. 2001) (two year gap between protected conduct and alleged retaliation defeated claim); Miller v. New

Hampshire Dept. of Corrections, 296 F. 3d 18, 19 (1st Cir. 2002) (same); Mesnick v. General Electric Co., 950 F. 2d 816, 828 (1st Cir. 1991) (nine month gap defeated retaliation claim).

At best, Li's argument can be understood as asserting that during the limitations period, she continued to suffer the effects (primarily her severe emotional distress) of prior discriminatory acts. In the absence of a separate and timely violation of Title VII, however, this is not sufficient to establish a continuing violation. Ledbetter v. Goodyear Tire & Rubber Co., 127 S. Ct. 2162 (2007); Kassayse v. Bryant College, 999 F. 2d 603, 606 (1st Cir. 1993). See also National R.R. passenger Corp. v. Morgan, 536 U.S. 101, 116-17 (2002).

We have reviewed Li's remaining claims and find them either waived, United States v. Zannino, 895 F. 2d 1, 7 (1st Cir. 1990), or meritless. Finding the facts and legal arguments adequately presented in the briefs and record, we deny appellant's motion for oral argument. Fed. R. App. P. 34(a).

The judgment of the district court is affirmed.

By the Court:

Richar Cushing Donovan, Clerk.

By:

Margaret Carter (Chief Deputy Clerk)

United States Court of Appeals
For the First Circuit

No. 07-1185

YONG LI,
Plaintiff, Appellant,
v.
RAYTHEON COMPANY, ET AL.,
Defendants, Appellees,

Before
Boudin, Chief Judge,
Campbell, Senior Circuit Judge,
Torruella, Circuit Judge,
Selya, Senior Circuit Judge,
Lynch, Lipez and Howard, Circuit Judges.

ORDER OF COURT
Entered: January 17, 2008

Pursuant to the First Circuit Internal Operating Procedure X C, the request for en banc rehearing has been treated as both a petition for

rehearing en banc and for rehearing before the original panel.

The petition for rehearing having been denied by the panel of judges who decided the case and the petition for rehearing en banc having been submitted to the active judges of this court and a majority of the judges not having voted that the case be heard en banc, it is ordered that the petition for rehearing and petition for rehearing en banc be denied.

All other pending motions filed by appellant are denied.

By the Court:

Richard Cushing Donovan, Clerk.

By:

Margaret Carter (Chief Deputy Clerk)

Yong Li's Internal Complaint of 2002

In January 2001, I worked in Mult-user DMS group. That time, I met the most horrible manager I ever met. Jen Lewis was a task manager in P1. After I shown to try to leave DMS group and wanted to work for Waseem Naqvi, Jen started to give me hard time. Whenever I argued with Belinda (the group leader) about some technical issure, Jen always stepped on me, it was very easy to step on me, because in this group, Gayle, Shari have treated me not fair for long time. In their mind, not fair to me is fare, but if I try to argue with them, it would be not fair(Freedom is slavery?). There is a typical example here, Gayle created an action item in my code review (funny thing is that Gayle does not understand code), this action item asked me to re-write a part of my code for better readability (to who?). But my code was optimized, so I swapped the IF part and ELSE part to let the action item go. But Belinda was not satisfy my fixing, she re-modified the code in different way, and I found the modified code was not as good as the original, so I send email to ask the group members to discuss, which caused Jen, Gayle, Shari were angry with me (How dare a

Chinese showed the truth to everyone?). Jen set a lunch team meeting, she expected that the team members should support the leader, but Ian, Conall and William supported me. Then Jen asked them out of the meeting room, left Belinda, Shari, Jen and me in meeting, three to one, that time, Jen showed me her true color, jen declared in might voice to me "Yon send email to group members to ATTACK Belinda! It is not fair to Belinda..." How scary it was, I never met a manager who is able to promote a technical discussion t be a politic attacking, and I never met a manager who holds might power to allege a criminal behavior to me, at the time, even Belinda was shock, but Shari was so enjoy to watch how Jen Lewis was 'bullying' me. And I asked to let Waseem or Mark Edry to judge my code, Jen and Shari refused, Jen said that Belinda's the leader, she has right to do what she wants. This so called attacking email effected my performance review, at beginning of 2002, when my section manager Anne Selwyn did annual performance review for me, there was a line says "disrespect the group leader when working in DMS". I told the true story to Anne, and I told Anne that I should ask Jen Lewis to make apologize to me. Anne said that Jen will become a

very high level person in Raytheon, if I ask her apologize, I would make an enemy. So what is fair to a low level person?

P.S. I saved the so-called attacking Belinda email. I saved the email Gayle sent me to blame me did not give Kathy a good training.

I listed the lines from an Irish colleague's mail, he joined the DMS work in 2001:

...When we first went out to Marlborough, it very quickly became clear to both Conall and myself that you were not being fairly treated especially by Gayle. I was surprised that in the US above all places, that such behavior would be tolerated. ...

Belinda's email to Yong Li

Do you think making more branch is better readability?
Yong

.....

Belinda A Gunn wrote:

Yong,

You are correct my changes did increase lines of code by 5 and increase ND from 1 to 2; However, the purpose of your action item was to rewrite your if statement for better readability. This meant that some code needed to be expanded so that it is easier to understand.

For instance, your correct that you only call ys_unlock_dialog twice in the following lines,

```
if( (ssr_code_action[MODIFY]) && (yy_rtn == TRUE) )
{
    ys_unlock_dialog( ..., MODIFY);
}
else
{
    ys_unlock_dialog( ... , VIEW);
}
```

However, it is not true that "one is for view action, the other for Modify action" ... What your code really implies is that you unlock when action is MODIFY, unlock when action is VIEW, AND unlock when yy_rtn is false. I called ys_unlock 3 times so that you can clearly see all the cases when ys_unlock is called ....

I expanded the if statement as follows:

```
>     if (yy_rtn == TRUE)
>     {
>        if (MODIFY)
>        {
>                ys_....unlock
>        }
>        else (VIEW)
>        {
>                ys.....unlock
>        }
>     }
>     else (yy_rtn == FALSE)
>     {
>        ys_....unlock
>     }
>
> bgunn
```

>> Date: Tue, 10 Jul 2001 10:07:12 -0400

MCS
Network Centric System
1001 Bostoo Post Road
Marlboro. MA 01752 USA
508.4902150
508.4902740 fax

To: JD McCarty, Irv Kooris, Gerard Gasperini and Charles Hackett

From: Stephanie Kolenski Date: January 4, 2005

Re: Phone Conversation with Yong Li

I received a phone call from Yong Li on Friday, December 3rd @ 2pm. She was calling in response to the certified letter that was sent to her earlier in the week by Human Resources. This letter explained to Yong that Human Resources had received notification from Metropolitan Life that her short-term disability claim had been denied on November 24111 and she was to return to work by Wednesday, December 8th. The letter further explained that if she did not return to work by the set date, that it would be considered job abandonment and human resources would process her termination. Yong explained that the claim was denied because of a miscommunication between her doctor and MetLife. She continued to explain that

her doctor would be forwarding the necessary documents to MetLife either that Friday or Saturday. Yong stated that she thought it was unfair for Raytheon to ask her to return so soon. She wanted Raytheon to allow her stay out until MetLife reopened her claim. I explained to Yong that in cases where a short-term disability claim is denied that Raytheon requests the employee to return work. I was trying to make it clear that this is the standard procedure. Yong was adamant about how it was wrong for us to make her come back to work and that we were not giving her enough notice. Yong then asked if I thought it was safe for her to return to work and whether she was healthy enough to return to work. I responded that I was not a medical professional and that I could not answer that question. She then asked me if I would feel safety if she returned to work. Then she said: what if I wanted to kill you. I asked her to repeat what she said and to further explain what she meant and she did not respond. Though the words she used made me uncomfortable, I did not take her statement as a personal threat directed towards me. In my opinion, Yong's statement seemed like a desperate plea in an effort to convince me that she should be allowed to stay out longer. I have had

several conversations with Yong In the past and it has been my observation that Yong does not have a good grasp on the English language and has a tendency to misuse words when communicating. She then said that she was going to call Keith Peden. She mentioned an email that she sent to Keith and explained that Keith had responded that he would personally take care of her situation. She told me again that she was going to call him and I said that was fine. She then said that she was going to sue Raytheon for treating her this way and that this treatment was unfair. Again she said that she was going to call Keith Peden and then she hung up.

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

YONG LI, (pr se) Petitioner,	)
V.	)A. C. No. 07-1185
RAYTHEON COMPANY, IAN C. MITCHELL, AND ARTHUR BULIUNG	)
Respondents	)

PETITIONER'S MOTION FOR LEAVE TO STRIKE THE FOOTNOTE-1 OF THE JUDGEMENT ON SEPTEMBER 10, 2007 IN CASE POTENTIAL DEFAMATION, OR IN ALTERNATIVE, ADD STEPHANIE KOLENSKI'S COMMENT INTO THE FOOTNOTE

Plaintiff-Appellant-Petitioner, Yong Li ("Li"), hereby respectfully requests the panel to strike the footnote-1 in the panel's judgment of September 10, 2007 in case potential defamation, or in alternative, add Stephanie Kolenski's comment into this footnote. The petitioner states reasons as follow:

1. Defendant-Appellee-Respondent, Raytheon Company ("Raytheon"), knowingly misled the panel when they stated Li asked "what if I wanted to kill you." They tactically ignored Raytheon HR officer Stephanie Kolenski's memo of January 4, 2005 (See the Exhibit A), in which Ms. Kolenski stated "I did not take her statement as a personal threat directed towards me. In my opinion, Yong's statement seemed liked a desperate plea in an effort to convince me that she should be allowed to stay out longer. I have had several conversations with Yong in the past and it has been my observation that Yong does not have a good grasp on the English language and has a tendency to misuse words when communicating."

2. Raytheon knowingly ignored that Li's statement was a discussion about the safety. because Kolenski's memo stated "I was trying to make it clear that this is the standard procedure. Yong was adamant about how it was wrong for us to make her come back to work and that we were not giving her enough notice. Yong then asked if I thought it was safe for her to return to work and whether she was healthy enough to return to work. I responded that I was not a medical professional and that I could not answer that question. She then asked me if I would feel safe if she returned to work. The she said: what if I wanted to kill you."

3. What Ms. Kolenski did not mention in her memo was that when Li told Kolenski the "termination was not fair," Kolenski said "I

don't care, it is company policy (A 176)." In fact, there was no such policy [if MetLife denied an employee's benefit, the employee has to go back to work immediately].

4. The panel apparently did not accept that Li was severed traumatized by Raytheon's accusation "do you want to kill someone," so that the penal would not likely want to believe that Li was simply asking back John Didio's abusive question.

5. The panel apparently did not want to believe that Raytheon attempted to drive Li insane when they warned Li to go back to work and hid Dr. Reade's report, in which Dr. Reade stated Li suffered "depressive disorder with psychotic features." Raytheon knew and should have known that all the school shoot or office shoot caused by "psychotic feature."

6. Turning a victim of discrimination to a potential murder is mental torture; Demonizing a victim of mental torture is inhuman, the panel understand the reality and should not accept such demonizing.

WHEREFORE, Plaintiff-Appellant-Petitioner respectfully request that the panel strike the footnote-1 in the judgment of September 10, 2007 in case potential defamation, or in alternative, add Stephanie Kolenski's comments (underlined above) into the footnote.

Respectfully submitted,

Yong Li (pro se)

/s/
Name: Yong Li (pro se)

Address: 32 Willow Road

Sudbury MA 01776

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No. 08-526

Supreme Court, U.S.
FILED
NOV 2 1 2008
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

YONG LI,

Petitioner,

v.

RAYTHEON COMPANY, IAN C. MITCHELL, AND ARTHUR BULIUNG,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Dated: November 21, 2008

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QUESTIONS PRESENTED

1. Whether summary judgment for respondent Raytheon Company was warranted on Petitioner's retaliation claim under Title VII of the Civil Rights Act of 1964 where the actions complained of that occurred within the limitations period did not constitute actionable adverse actions.

2. Whether summary judgment for respondent Raytheon Company was warranted on Petitioner's retaliation claim under Title VII of the Civil Rights Act of 1964 where the evidence was insufficient to support an inference of a causal connection between Petitioner's protected activity and the Company's alleged adverse actions.

3. Whether summary judgment for respondent Raytheon Company was warranted as to a portion of Petitioner's retaliation claim under Title VII of the Civil Rights Act of 1964 on statute of limitations grounds where Petitioner was apprised of the alleged falsity of the alleged retaliatory statements outside the limitations period.

LIST OF PARTIES AND RULE 29.6 STATEMENT

The parties named in the caption, Yong Li, Raytheon Company, Ian C. Mitchell, and Arthur Buliung, were the only parties to the proceedings before the court of appeals and the district court. Raytheon Company has no parent companies, and there are no publicly-held companies that own ten percent or more of its stock.

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondents, Raytheon Company, Ian C. Mitchell, and Arthur Buliung, respectfully oppose the petition for writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit.

OPINIONS BELOW

As stated by Petitioner.

JURISDICTION

As stated by Petitioner.

STATUTES INVOLVED

Respondents contend that only 42 U.S.C. § 2000e-3(a) is involved and relevant to the petition. Petitioner's citation to 42 U.S.C. § 2000e-2(a) is improper as the petition does not involve any issue under Section Two of the statute.

STATEMENT OF THE CASE

Factual Background.

Respondents provide the following supplementation to Petitioner's description of the factual background.

Petitioner was hired by Raytheon Company ("Raytheon") as a Senior Software Engineer in the company's Network Centric Systems ("NCS") busi-

ness unit on or around January 5, 1998. (Pet. at 4a). In July 2001, Petitioner had a disagreement with a co-worker over the proper methodology to be used in a software design project. (*Id*). Jennifer Lewis, Petitioner's supervisor at the time, determined that both proposed methodologies were viable but indicated that deference should be given to the co-worker's methodology because she was ultimately responsible for the success of the project. (*Id.*)

Over a year later, in October 2002, Petitioner complained to Raytheon that she had been subjected to "discrimination" by Ms. Lewis after the 2001 disagreement with her co-worker. (*Id.*). Specifically, Petitioner alleged that Ms. Lewis treated her unfairly in failing to give her proper credit on the software design project. Raytheon investigated Petitioner's complaint several times (at Petitioner's request) and concluded that there was no evidence supportive of Petitioner's complaint of discrimination against Ms. Lewis. (Pet. at 4a – 5a).

In March/April 2003, Li was assigned to a Raytheon project in Virginia and temporarily relocated to the area to work on that project. (*Id.* at 5a). In December 2003, Petitioner's work on the project in Virginia was coming to an end, and her Section Manager, Scott Oglesby, assisted in finding her next assignment. (*Id.* at 121a).

In 2004, Mr. Oglesby worked to find as much work as possible in the Company's business units for all members of his section affected by the lack of contract funding, including Petitioner. (*Id.* at 121a, 150a). During this period, Mr. Mitchell, Petitioner's

department manager, also attempted to find work for Petitioner. (*Id.* at 85a-86a). In June 2004, Petitioner found a position working on the Company's ERAM project, which did not require a security clearance. (*Id.* at 5a).

Starting in July 2004, Petitioner started sending a series of disturbing internal e-mails. (Pet. at 5a-6a). On July 17, 2004, Petitioner sent an e-mail to a number of Asian co-workers (and Ms. Ervin) complaining about her treatment at Raytheon by her supervisors, including an alleged "conspiracy" by management to push her out of Raytheon. (*Id.* at 5a, 127a).

On July 19, 2004, Ms. King, Mr. Buliung, and Stephanie Kolenski (a Human Resources Generalist supporting Software Engineering) met with Petitioner to attempt to understand her concerns as expressed in the July 17th e-mail and resolve the situation. (*Id.* at 150a). They discussed her job situation including the ERAM program placement, and explained that the primary reason it was not easy to place her was the fact that she did not have a security clearance. (*Id.*).

On July 29, 2004, Petitioner sent an email to Mr. Buliung, noting a recent conversation she had with Mr. Oglesby. (*Id.* at 130a). Petitioner wrote, in part, "I told Scott [Oglesby] that if anything happened on me or on my family, don't believe that it's an accident, it may be a 'murder'!"

On August 2, 2004, Petitioner sent an email to Mr. Buliung, attaching previous email exchanges

with Mr. Mitchell. (*Id.* at 123a). Petitioner wrote "This is the e-mail I sent to Ian Mitchell originally, you can see what he replied, he didn't feel any surprise about how Scott treated, mazz [sic]? Some men are really dirty!"

On August 3, 2004, Mr. Buliung and Ms. Kolenski met with Petitioner to discuss her recent emails and to suggest that she meet with John Didio, a counselor from the Employee Assistance Program offered by the Company. (Pet. at 5a). Neither Mr. Buliung nor anyone else at Raytheon had supervision or control over Mr. Didio's work or evaluation of Petitioner. (*Id.* at 70a).

Petitioner agreed to meet with Mr. Didio. At the meeting, Mr. Didio told her that their conversation would remain confidential and that she should speak freely. (Pet. at 120a). Mr. Didio explained to her, in some detail, about the EAP and indicated that he was there to assist her in any way possible. (*Id.*). Mr. Didio read Petitioner's July 29, 2004 email with the "murder" reference, and asked if she was afraid of anyone working at Raytheon. (*Id.*). She responded "Jen Lewis," because Ms. Lewis allegedly stared at her in the hallway. (*Id.*). Mr. Didio also asked Petitioner if she wanted to harm anyone at Raytheon (he tried to explain this was part of his standard questioning) to which she responded angrily, "How can you say that to me?" She went on to say that she is "the victim here." (*Id.*). The meeting ended soon after this exchange. (*Id.*).

On August 8, 2004, Petitioner sent an email to the Raytheon Asian Pacific Employees Association

("RAPA") and Mr. Buliung, in which she claimed that Mr. Didio insulted her in their August 3rd meeting. (Pet. at 131a). The following day, Mr. Buliung and Ms. Kolenski met with Petitioner to discuss the RAPA email, and to inform her that company mass email distribution was not to be used for personal concerns. (*Id.* at 97a, 132a). They also pointed out that Mr. Didio did not behave as Petitioner accused in her email. Petitioner agreed and also agreed not to use Company email for personal use. (*Id.*).

Shortly thereafter, Mr. Buliung and Ms. Kolenski again met with Petitioner and Ms. King. (*Id.* at 54a). In addition, at Petitioner's request, another employee of Asian descent, Ed Tang, was invited to act as an interpreter should the need arise for clarification of the conversation. (Pet. at 72a-73a). Based upon their discussions, the Company once again believed that these meetings resolved any outstanding concerns expressed by Petitioner. (*Id.* at 73a).

However, on August 30, 2004, Petitioner sent a mass e-mail (which was copied to William Swanson, Chairman & CEO of Raytheon Company), in which she claimed that "John Didio with his professional skill poisoned my brain, he treated me, a victim as a potential murder, this is an evil behavior! As I'm sitting in my office and working, but quiet offenly [sic], I want to scream!!!" (*Id.* at 6a).

The following day, August 31, 2004, Raytheon determined that Petitioner should be placed on paid administrative leave and that she be provided with a professional psychological evaluation to assist her

and determine her fitness to return to work. (*Id.* at 6a, 74a).

Following approximately four weeks of paid administrative leave, in early October 2004, Petitioner applied for STD insurance benefits to MetLife, Raytheon's plan administrator, and was initially approved. (Pet. at 54a-55a). The STD and LTD benefit plans for Raytheon employees are administered by MetLife; therefore Raytheon played no role in making the benefits determination with respect to Petitioner's application. (*Id.* at 6a, 54a-55a). While on STD, Petitioner was allowed time off pursuant to the Family Medical Leave Act ("FMLA") and placed in a medical leave status. Based on Petitioner's failure timely to submit documentation required by MetLife to substantiate her continued need to remain on disability benefits, MetLife terminated Petitioner's STD coverage as of November 22, 2004. (*Id.* at 55a).

In light of the termination of Petitioner's STD benefits coverage by MetLife, Ms. Kolenski notified Petitioner in writing on November 30, 2004 that she would need to return to work by mid-December 2004. (*Id.* at 55a, 143a). Ms. Kolenski also requested that Petitioner make Raytheon aware of any "extenuating circumstances" that would affect the date set by the Company for her to return to work. (*Id.* at 143a). In response to this letter, on December 3, 2004, Petitioner called Ms. Kolenski and asked her "What if I wanted to kill you?" (*Id.* at 6a & n.1, 115a).

On January 17, 2005, Ms. Kolenski notified Petitioner that her employment would be administratively terminated effective January 21, 2005 on

the grounds that her FMLA leave period had expired and she failed to provide a return to work date. On January 22, 2005, having failed to return to work or provide documentation of a continuing disability, Petitioner was administratively terminated from the Company. (Pet. at 56a).

In April 2005, following her successful appeal of MetLife's November 2004 denial of benefits determination, Petitioner's STD benefits were approved and her coverage was extended through January 5, 2005. Her Long Term Disability (LTD) insurance claim also was approved for coverage beginning January 6, 2005. Raytheon human resources representatives were not made aware of these developments until May 18, 2005. (*Id.*).

Based on MetLife's reversal of its November 2004 STD benefits denial, Raytheon reinstated Petitioner to a medical leave status, and informed her of the change in status on May 20, 2005. (*Id.*).

Proceedings Below.

As stated by Petitioner. Further, the relevant decisions and orders below were not reported.

REASONS FOR DENYING THE PETITION

I. IT IS NOT NECESSARY IN THIS CASE TO REACH THE ISSUE OF WHETHER THE ALLEGED RETALIATORY DIVERSE ACTION WAS CAUSALLY CONNECTED TO PETITIONER'S PROTECTED ACTIVITY BECAUSE THE ENTRY OF SUMMARY JUDGMENT FOR THE RESPONDENT WAS WARRANTED ON A SEPARATE AND INDEPENDENT GROUND.

This Court should deny the petition because summary judgment was warranted on the separate and independent ground that the evidence was insufficient to support a finding that the alleged retaliatory actions complained of were materially adverse to Petitioner and therefore actionable.

Specifically, Petitioner alleges that she sustained certain adverse actions during the limitations period (after June 25, 2004) which were retaliatory in nature, including Raytheon's treatment of her at an August 2004 meeting with an EAP counselor, the Company's decision to place her on administrative leave at the end of August 2004, the Company's alleged withholding of a psychiatrist's report regarding her fitness to return to work, and the Company's involvement in her short-term disability benefits application process.

This Court has held that to be actionable in the context of a Title VII retaliation claim, an adverse action must be "materially adverse" in that the

action "well might have dissuaded a reasonable worker from making or supporting a charge of discrimination." *Burlington Northern and Santa Fe Railway Company v. White*, 548 U.S. 53, 68 (2006) (Internal citations omitted). None of Raytheon's allegedly adverse actions rise to this "materially adverse" standard.

First, Raytheon's recommendation that Petitioner meet with EAP counselor John Didio in August 2004, standing alone, does not constitute materially adverse action. Further, there is no evidence to suggest that the Company's representatives, as opposed to Mr. Didio, said or did anything at the meeting that could reasonably be construed as adverse. Mr. Didio was not employed by Raytheon; he worked for the Company's EAP vendor which provided, among other services, counseling to the Company's employees. (Pet. at 5a, 70a).

Second, there is no evidence to suggest that Raytheon's decision to put Petitioner on administrative leave for medical reasons at the end of August 2004 constituted a materially adverse action. Indeed, Petitioner has not alleged that she should not have been placed on administrative leave and, in fact, saw a psychiatrist at the Company's request.

Third, there is no evidence to suggest that Raytheon withheld a psychiatrist's report regarding her fitness to return to work. The report in question was authored by Dr. Julia Reade, who Petitioner saw in October 2004. Petitioner admits that the Company provided a copy of Dr. Reade's report to her primary care physician. (Pet. at 9 & n.7). Therefore,

Petitioner cannot show that Raytheon withheld Dr. Reade's report or that its disclosure of the report (to her primary care physician) constituted a materially adverse action. Further, there is no basis to suggest that Raytheon's decision to disclose the report to Petitioner's primary care physician (as opposed to Petitioner directly or her Chinese doctors) constituted a materially adverse action.

Finally, there is no evidence to support Petitioner's claim that Raytheon "hindered [her] short term disability [benefits] application," or that the Company's involvement in her short term disability ("STD") application process constituted a materially adverse action. (*Id.* at 17). Petitioner's STD benefits are administered by MetLife, not by Raytheon. (*Id.* at 6a, 54a-55a). MetLife is the sole decision-maker concerning Petitioner's application for benefits. (*Id.*). Additionally, there is no evidence that Petitioner suffered any harm because it is undisputed that she received STD and LTD benefits. (*Id.* at 56a). Based on the foregoing, there is no evidence to suggest that Raytheon's involvement in her short term disability benefits application process constituted action that "well might have dissuaded a reasonable worker from making or supporting a charge of discrimination." *White*, 548 U.S. at 68.

II. THE ISSUE OF WHETHER TEMPORAL PROXIMITY BETWEEN THE PROTECTED CONDUCT AND THE ALLEGED RETALIATORY ACT IS REQUIRED TO ESTABLISH CAUSATION IS NOT RIPE FOR REVIEW BECAUSE THE DECISION OF THE COURT OF APPEALS IN THIS CASE IS NOT IN CONFLICT WITH THAT OF OTHER COURTS OF APPEALS.

In the first question set forth in the petition, Petitioner contends that the decision of the court of appeals to affirm summary judgment on her retaliation claim conflicts with the decisions of three other courts of appeals as to the type and sufficiency of evidence required to establish the causal element of a prima facie case of retaliation under Title VII of the Civil Rights Act of 1964. Specifically, Petitioner contends that, unlike the rulings of three other courts of appeals, the court of appeals in this case ruled that temporal proximity between the protected activity and the alleged retaliatory act is necessary, as a matter of law, to maintain the causal element of a prima facie case of retaliation under Title VII. (Pet. at 17). This contention is incorrect. In its decision below, the court of appeals stated that "[g]aps of months and years *weaken* any inference of a causal connection." (emphasis supplied). This statement demonstrates that it was the ruling of the court that while temporal proximity was a factor to be considered in determining whether adequate evidence of the causal connection exists, it was not required. The court's statement indicated that the inference of a causal connection would be weakened by the ab-

sence of temporal proximity, but that this absence was not necessarily fatal and could be overcome by other evidence. (Pet. at 7a) This ruling is consistent, and not in conflict, with the decisions of the three courts of appeals the Petitioner points to. See *Kachmar v. Sungard Data Systems, Inc. et al.*, 109 F.3d 173, 177 (3d Cir. 1997); *Dixon v. Gonzales, et al.*, 481 F.3d 324, 333 (6th Cir. 2007); *Porter v. California Dep't. of Corr.*, 419 F.3d 885, 895 (9th Cir. 2005).

III. IT IS NOT NECESSARY IN THIS CASE TO DECIDE WHETHER TEMPORAL PROXIMITY BETWEEN THE PROTECTED CONDUCT AND THE ALLEGED ADVERSE RETALIATORY ACTION IS REQUIRED TO SATISFY THE CAUSAL CONNECTION ELEMENT BECAUSE THE PETITIONER ADDUCED NO ALTERNATIVE EVIDENCE THAT WOULD SUPPORT A FINDING OF CAUSATION

Petitioner contends that the court of appeals erred in ruling that there must be temporal proximity between the protected conduct and the alleged retaliatory acts to support the necessary inference of a causal connection. Petitioner goes on to argue that this ruling was in conflict with that of other circuits, suggesting that if the alleged different rule from those other courts of appeals was applied, summary judgment would not have been warranted. The evidence here, however, is insufficient to support the necessary causal connection inference under any reading of the law.

Specifically, this Court and the courts of appeals for the First, Third, Sixth, and Ninth Circuits all have ruled that temporal proximity between the protected activity and the alleged retaliatory act is relevant to the causal element of the prima facie case "because this is an obvious method by which a plaintiff can proffer circumstantial evidence sufficient to raise the inference that her protected activity was the likely reason for the adverse action." *Kachmar,* 109 F.3d at 177. *See also Breeden,* 532 U.S. at 273-74; *Dressler,* 315 F.3d at 79-80; *Dixon,* 481 F.3d at 333; *Porter*, 419 F.3d at 895.

Notwithstanding the relevance of temporal proximity to the causation analysis, however, the courts of appeals for the Third, Sixth, and Ninth Circuits have expressly ruled that a longer time interval between the protected activity and the alleged retaliatory act is not fatal to the causation element of the prima facie case where there are valid reasons why the adverse action was not taken immediately, such as, for example, where during the intervening interval the alleged harasser did not have an opportunity to retaliate against the plaintiff. *See Kachmar,* 109 F.3d at 177; *Dixon,* 481 F.3d at 335; *Porter,* 419 F.3d at 895; *Ford v. General Motors Corp.*, 305 F.3d 545, 552 (6th Cir. 2002).

In *Dixon*, an African-American former agent of the FBI sued the Attorney General, alleging, among other things, retaliation in violation of Title VII for complaining of racial discrimination. On appeal to the Sixth Circuit, the plaintiff argued that the district court erred by focusing narrowly on the ten-year period that elapsed between his protected

activity and the adverse action taken by his alleged harasser. *Dixon,* 481 F.3d at 335. The plaintiff argued that a finding of causal connection was not foreclosed in his case because the alleged harasser did not have the ability to retaliate against him until the alleged harasser's views on the plaintiff were solicited as part of a reinstatement decision – ten years after the protected activity.

The Sixth Circuit ruled that a ten-year gap in time is not dispositive of the causation requirement. *Id.* The Court found, however, that the plaintiff's argument nonetheless failed because there was insufficient evidence to raise an inference that the alleged harasser's negative recommendation likely caused the denial of his reinstatement to the FBI, or that it was even retaliatory in nature. *Id.* at 336. The Sixth Circuit also noted that there was no evidence that the alleged harasser sought to retaliate against the plaintiff. *Id.*

In *Porter*, the Ninth Circuit analyzed a record with relevant facts that were similar to those considered by the Sixth Circuit in *Dixon*. Specifically, the plaintiff in *Porter* brought suit alleging that she was retaliated against because she complained about sexual harassment. *Porter,* 419 F.3d at 887. The plaintiff reported her complaints in 1995 but the alleged retaliation – the denial by the plaintiff's alleged harasser of her various requests for transfers – did not occur until 1998. *Id.* at 887-89. The Ninth Circuit concluded that the multi-year gap between the plaintiff's protected activity and the adverse employment action did not defeat a finding of a causal connection because the plaintiff's harasser did not

have the opportunity to retaliate until he was given responsibility for making personnel decisions in 1998. *Id.* at 895.

Similarly, in *Ford*, the plaintiff alleged that his supervisor retaliated against him as a result of the plaintiff's filing of a race discrimination charge with the EEOC. For a five-month period following his EEOC filing, the plaintiff voluntarily worked in a different position and was not within his supervisor's sphere of authority. *Id.* at 550. When the plaintiff was placed back under his supervisor's direction, the supervisor allegedly retaliated by imposing an increased workload on plaintiff, subjecting his performance to heightened scrutiny, and threatening to terminate him. *Id.* at 550-51. The Sixth Circuit determined that the five-month interval between the protected activity and the adverse actions did not foreclose a finding of a causal connection because the plaintiff was under the control of a different supervisor during this period. *Id.* at 554-55.

Petitioner asserts that similar "valid reasons" exist to explain the two year gap between her protected activity and Raytheon's alleged adverse action, specifically her absence from the Massachusetts facilities of Raytheon during her year-long assignment to Raytheon's Langley, Virginia facility. (Pet. at 17). However, unlike in the *Dixon, Porter,* and *Ford* cases, in this case there was no evidence that the individual who was the subject of Petitioner's race discrimination complaint in 2002 – Jennifer Lewis – played *any* role in the alleged retaliatory events that occurred within the limitations period in 2004. It is undisputed that Ms. Lewis was not in-

volved in the August 2004 meeting with the EAP counselor, the decision to place Petitioner on administrative leave at the end of 2004, the issues surrounding Dr. Reade's report in the fall of 2004, or Petitioner's short-term disability benefits application in late 2004 and early 2005. Thus Petitioner's separation from Mr. Lewis as a result of her year-long assignment in Virginia does not support the application of the exception to the temporal proximity requirement that the courts in the *Dixon, Porter,* and *Ford* cases recognized.

IV. THIS CASE WOULD NOT PRESENT A FULL OPPORTUNITY TO CONSIDER WHETHER TITLE VII SUITS ARE AMENABLE TO A DISCOVERY RULE BECAUSE THE UNDISPUTED EVIDENCE IN THIS CASE INDICATES THAT THE PETITIONER WAS APPRISED OF THE ALLEGED BASIS FOR HER RETALIATION CLAIM OUTSIDE THE LIMITATIONS PERIOD.

Petitioner was apprised of the alleged basis for her retaliation claims outside the limitations period (prior to June 25, 2004). Thus, there is no basis for Petitioner to request that this Court employ a discovery rule to resurrect her time-barred allegations of retaliation. Therefore, this case does not present a full opportunity to consider whether Title VII suits are amendable to a discovery rule and the petition should be denied accordingly.

In her petition, Petitioner claims that she "had no reason to suspect the [time barred retalia-

tory] conduct [] harbored retaliatory animus until her supervisor [Scott Oglesby] denied his layoff statement and claimed there was no layoff plan." (Pet. at 18). Petitioner questioned the accuracy of Mr. Oglesby's layoff claims in May 2004, however, and therefore was aware or should have been aware *at that time* that his earlier, allegedly false layoff claim may have been motivated by retaliatory animus. (*Id.* at 123a-124a).

Given that Petitioner was aware that she may have been subject to retaliatory conduct outside the limitations period (May 2004), the Court should reject her request that the Court adopt, apply or even consider a 'discovery rule' to resurrect her time-barred retaliation allegations.[1]

[1] Respondents presume that the petition is limited solely to Count II (retaliation) of Petitioner's Second Amended Complaint. (Pet. at 45a, 48a). In the court of appeals Petitioner failed to raise any argument supporting an appeal on Count I. Therefore any appeal to this court on that count is waived.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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In the

Supreme Court of the United State

Yong Li,

Petitioner,

v.

Raytheon Company, Ian C. Mitchell, and Arthur Buliung,

Respondents.

Civil Appeal To the
United States Court of Appeal
For The First Circuit

Petitioner's Reply to Brief in Opposition

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Dated: December 01, 2008

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II. IT IS NOT NECESSARY IN THIS CASE TO DECIDE WHETHER THE PERSON, TO WHOM THE PROTECTED ACTIVITY AGAINST, PLAYED A ROLE IN THE ALLEGED ADVERSE EMPLOYMENT ACTIONS BECAUSE THE FIRST CIRCUIT'S RULING WAS SOLELY BASED ON TEMPORAL PROXIMITY TO ESTABLISH THE CAUSAL CONNECTION ELEMENT. 2

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*Porter, 419 F.3d at 895 (*quoting *Kachmar, 109 F.3d at 177)* 2

ARGUMENT IN REPLY

I. THE SUPREME COURT SHOULD STRIKE THE USING OF TEMPORAL PROXIMITY AS A MUST-FACTOR TO ESTABLISH CAUSAL CONNECTION ELEMENT OF PRIMA FACIE CASE IN RETALIATION CLAIMS

The Respondent did not directly argue for the First Circuit's ruling that "There ***must*** be some temporal proximity between the protected conduct (...) and the alleged retaliation." (emphasis supplied). The Respondent, however, quoted the decision below which stated "[g]aps of months and years ***weaken*** any inference of a causal connection." (emphasis supplied). The Respondent argued that the later "is not in conflict with that of other courts of appeals." Unfortunately, in reality, the causal connection has nothing to do with the gaps of months and years, although an existence of temporal proximity could prove the causal connection. In another word, the "[g]aps of months and years ***weaken*** any inference of a causal connection" is illogical.

> It is important to emphasize that it is causation, not temporal proximity itself, that is an element of plaintiff's prima facie case, and temporal proximity merely provides an evidentiary basis from which an inference can be drawn. The element of causation,

> which necessarily involves an inquiry into the motives of an employer, is highly context-specific. When there may be valid reasons why the adverse employment action was not taken immediately, the absence of immediacy between the cause and effect does not disprove causation.
>
> *Porter, 419 F.3d at 895 (*quoting *Kachmar, 109 F.3d at 177)*.

The Supreme Court should stop the using of temporal proximity as a ***must***-factor to establish causal connection element of prima facie case in retaliation claims.

II. IT IS NOT NECESSARY IN THIS CASE TO DECIDE WHETHER THE PERSON, TO WHOM THE PROTECTED ACTIVITY AGAINST, PLAYED A ROLE IN THE ALLEGED ADVERSE EMPLOYMENT ACTIONS BECAUSE THE FIRST CIRCUIT'S RULING WAS SOLELY BASED ON TEMPORAL PROXIMITY TO ESTABLISH THE CAUSAL CONNECTION ELEMENT.

The Respondent changed the topic. The Respondent attempted to argue that because the Petitioner could not prove that Jen Lewis, to whom the protected activity against, played a role in the alleged adverse employment actions, so that the Petitioner "adduced no alternative evidence that would support a finding of causation," and so that "it is not necessary ... to decide whether temporal

proximity ... is required to satisfy the causal connection element ..."

It is just coincident that in *Dixon v. Gonzales, 481 F. 3d 324 (6th Cir. 2007); Porter v. California Dep's of Corr., 419 F. 3d 885 (9th Cir. 2005); Ford v. General Motors Corp., 305 F. 3d 554-55 (6th Cir. 2002); Kachmar v. SunGard Data Sys., Inc., 109 F.3d 173, 177 (3d Cir. 1997),* the persons to whom the protected activity against became the harassers and played key roles in the adverse employment actions. It does not mean that it would become a required factor that these persons themselves must directly play a role. Causal Connection element should depend on case by case, and the way of retaliation various based on human's imagination.

The concept of retaliator should not limit on one person, because it could be a company click, a group, or a political class. For those retaliation cases involved whistleblowers for public interest, anyone held power could become a retaliator.

CONCLUSION

For the foregoing reasons, and for the reasons discussed more fully in her Petition, Yong Li prays that this Court grant her petition for a writ of certiorari, and reverse the judgment below.

Respectfully submitted,

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/s/

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pro se petitioner